No. 93-2045

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In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES CITY COUNTY, VIRGINIA, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the Environmental Protection Agency's decision to "veto" a dredge and fill permit issued under Section 404 of the Clean Water Act, 33 U.S.C. 1344, based upon the agency's determination that the project would have unacceptable environmental effects.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I1-I19) is reported at 12 F.3d 1330. The opinion of the district court (Pet. App. H1-H48) is unreported. The prior opinions of the district court and court of appeals in this case (Pet. App. E1-E9 and F1-F14, respectively) are reported at 758 F. Supp. 348 and 955 F.2d 254.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1993. A petition for rehearing was denied on March 25, 1994 (Pet. App. J1-J2). The petition for certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation arises from the Environmental Protection Agency's (EPA's) exercise of its authority under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, to "veto" a permit that the Army Corps of Engineers would otherwise grant allowing petitioner James City County to discharge dredged and fill material into waters of the United States. The Corps initially approved the permit in accordance with Section 404(a) of the Act, 33 U.S.C. 1344(a). Pet. App. A1-A29, B1-B12. The EPA disapproved the permit based upon its authority under Section 404(c) of the Act, 33 U.S.C. 1344(c), which authorizes the EPA to review the Corps' permitting decisions. Pet. App. D1-D94. Petitioner challenged the EPA's decision in the United States District Court for the Eastern District of Virginia, which invalidated the EPA's determination and ordered the Corps to issue the permit. *Id.* at E1-E9. The court of appeals affirmed some of the district court's conclusions but remanded the case to the EPA for further action. *Id.* at F1-F14. The EPA reevaluated the matter and once again concluded that the Corps should not issue the permit. *Id.* at G1-G75. The district court once again set aside the EPA's veto. *Id.* at H1-H8. The court of appeals reversed the district court's decision. *Id.* at I1-I19.

1. The Clean Water Act establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), and to achieve, among other things, a level of water quality that "provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of pollutants into waters of the United States except as allowed under other sections of

the Act, including Section 404, 33 U.S.C. 1344, which establishes a permitting program for discharge of dredged or fill material. The Section 404 permitting program takes into account the important role of wetlands in the hydrological cycle. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-135 (1985).

Section 404(a) authorizes the Secretary of the Army—acting through the Army Corps of Engineers, 33 U.S.C. 1344(d)—to issue permits for the "discharge of dredged or fill material * * * at specified disposal sites." 33 U.S.C. 1344(a). The Corps exercises its permitting authority under guidelines promulgated by the EPA. See 33 U.S.C. 1344(b)(1); 40 C.F.R. Pt. 230. Those guidelines specifically recognize the importance of wetlands to an aquatic ecosystem. See 40 C.F.R. 230.1(d). In addition to applying the guidelines, the Corps evaluates permit applications under the "public interest review" criteria of its own regulations, 33 C.F.R. 320.4(a), which require consideration of the benefits and detriments associated with the proposed project. See 33 C.F.R. 320.4(a)(1). Cf. *United States* v. *Alaska*, 112 S. Ct. 1606 (1992).

Section 404(c) authorizes the EPA to veto a Corps decision to issue a permit if the EPA determines that the discharge

> will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

33 U.S.C. 1344(c). The EPA has issued regulations that define "unacceptable adverse effect" to mean an

> impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of

> municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas.

40 C.F.R. 231.2(e).

The EPA's regulations do not prescribe a balancing test like that employed in the Corps' public interest review. Instead, the ultimate focus of EPA's Section 404(c) examination is the severity of the adverse environmental impact that is likely to result from the discharge. See 44 Fed. Reg. 58,076, 58,078 (1979). As the EPA has explained, the term "unacceptable" refers to the significance of the adverse effect—"e.g. is it a large impact and is it one that the aquatic and wetland ecosystem cannot afford." *Id.* at 58,078. Thus, while the availability of practicable alternatives may be considered in determining whether or not the loss of resources is avoidable, "even when there is no alternative available, and 'vetoing' the site means stopping a project entirely, the loss of the 404(c) resources may still be so great as to be 'unacceptable.'" *Ibid.*

2. Petitioner proposes to build the Ware Creek Reservoir to meet its future local water supply needs. That project would entail constructing a dam across Ware Creek and placing fill into the Creek and its adjacent wetlands, which are "waters of the United States." See 33 U.S.C. 1362(7). Petitioner accordingly sought a Section 404 permit from the Army Corps of Engineers. The Corps conducted a review in accordance with the applicable regulations and issued the permit in July 1988. Pet. App. A1-A29, B1-B12. The district engineer noted, however, that "[t]his is not an easy determination," *id.* at A1, and that "[w]ere it not for the overpowering need for the project and the lack of

practicable alternatives, I could not justify this project as being in the public interest," *id.* at A3.

In July 1989, the EPA exercised its Section 404(c) authority to "veto" the permit. Pet. App. D1-D94. The EPA found that the Ware Creek project

> would result in a severe direct and cumulative loss of wildlife habitat and would result in serious impacts to and/or losses of involved wildlife species. In addition, the record reveals that there are practicable, less environmentally damaging alternatives that are available to James City County that would provide sufficient water supplies for its projected local needs. EPA therefore concludes that construction of the proposed Ware Creek impoundment would result in unacceptable adverse effects to wildlife.

Id. at D93-D94. The EPA concluded that the project's impacts were "unacceptable" because they would be both "profound" and "avoidable" in light of the practicable alternatives that the EPA believed were available to meet petitioner's water supply needs. *Ibid.* See 33 U.S.C. 1344(c).

3. Petitioner brought suit in federal district court to challenge the EPA's veto. The district court held that the EPA's Section 404(c) determination was "improper," based upon the court's finding that "the record undoubtedly proves that no practicable alternatives are in fact available to James City County." Pet. App. E9. The court enjoined the Corps to "issue a permit to place fill to James City County for the Ware Creek Reservoir." *Ibid.* The government appealed, arguing that the district court had erred as a matter of law in directing the Corps to issue the permit. The court of appeals sustained the district court's finding that petitioner had

no practicable alternatives to the project. *Id.* at F10. It concluded, however, that the case should be remanded to the EPA for a determination whether "considerations of environmental effects would alone justify a veto." *Id.* at F13- F14.

4. On remand, the EPA reconsidered its veto determination in accordance with the court of appeals' decision. Pet. App. G1-G75. The EPA determined that the Ware Creek project would have "unacceptable adverse effects to wildlife," that petitioner's mitigation plans were insufficient to overcome those effects, and that "considerations of environmental effects alone" justified EPA's decision to "veto" the project under Section 404(c). Pet. App. G74. Petitioner challenged that determination in federal district court, and that court invalidated the EPA's veto. *Id.* at H1-H8. The court ruled that the EPA erred by failing to take into account petitioner's need for the project, *id.* at H2-H4, and that the EPA's determinations of adverse effects were not supported by substantial evidence, *id.* at H4-H8.

The government appealed once again, and the court of appeals reversed the district court's judgment. Pet. App. I1-I19. The court of appeals rejected the district court's conclusion that the EPA was obligated to grant a permit in light of petitioner's need for the project, holding as a matter of law that the EPA may veto a permit under Section 404(c) based solely upon the severity and significance of the environmental harms that would result from discharge of the dredged or fill material at issue. Pet. App. I10-I12. With respect to the underlying factual support for EPA's veto, the court of appeals held that the agency's findings were supported by the administrative record and were not arbitrary and capricious. *Id.* at I13-I19.

ARGUMENT

Petitioner challenges the court of appeals' determinations that (1) the EPA was entitled to veto the Army Corps of Engineers' issuance of a Section 404 permit "based solely on environmental harms" (Pet. App. I13); and (2) the EPA's veto was "supported by the administrative record" and was "not arbitrary and capricious" (*id.* at I19). Petitioner's challenges are without merit and present no issue warranting this Court's review.

1. Section 404(c) of the Clean Water Act states that the Administrator of the EPA may veto the Corps' issuance of a dredge and fill permit "whenever he determines, after notice and opportunity for public hearings, that the discharge of [dredge or fill] materials will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. 1344(c). Relying on that language, the court of appeals concluded that the EPA could veto a dredge and fill permit—notwithstanding the local community's interest in the underlying project—based solely on the adverse environmental impacts that would ensue from granting the permit. The court's straightforward determination is entirely correct.

As the court of appeals explained, Section 404(c)'s "practically unadorned" language authorizes the EPA to determine that the environmental effects of an otherwise beneficial project proposal are so severe that no permit should issue. Pet. App. I10-I13. Although the EPA normally considers project alternatives as a relevant factor when it exercises its permit review authority under Section 404(c), the EPA has long recognized that Section 404(c) authorizes it to veto a permit even though the permit applicant can devise no practical alternative

to the proposed project. As the EPA explained 15 years ago in its preamble to the pertinent regulations,

> [S]ection 404(c) does not require a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project. This view is based on the language of 404(c) which refers only to environmental factors. The term "unacceptable" in EPA's view refers to the significance of the adverse effect—e.g. is it a large impact and is it one that the aquatic and wetland ecosystem cannot afford. * * * [E]ven when there is no alternative available, and "vetoing" the site means stopping a project entirely, the loss of the 404(c) resource may still be so great as to be "unacceptable."

44 Fed. Reg. 58,078 (1979).

This case illustrates that longstanding principle. When the EPA initially reviewed the Corps' permitting decision, the EPA concluded that the availability of project alternatives was a relevant factor supporting its veto determination. See Pet. App. D92-D93. In the first round of litigation, the court of appeals rejected the EPA's finding that petitioner had practical alternatives to the Ware Creek project, *id.* at F12-F13, and the court allowed the EPA to determine on remand whether the environmental consequences were nevertheless so great that they warranted a veto of the Corps' permit, *id.* at F13-F14. The EPA made that inquiry, it concluded that the environmental consequences reached that level of severity, and it accordingly reinstated its veto. *Id.* at G1-G75. In the second round of litigation, the court of appeals concluded that the EPA made an appropriate decision based on the congressional directive contained in Section 404(c) and the EPA's understanding of the court of appeals' remand instructions. Pet. App. I9-I10.

The court of appeals' ruling that "the EPA could consider whether adverse environmental effects alone justified a veto" (Pet. App. I13) is consistent with the statutory language and the EPA's own reasonable interpretation of its authority. Compare *PUD No. 1* v. *Washington Dep't of Ecology*, 114 S. Ct. 1900, 1909 (1994); *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1060 (1992); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). It also properly recognizes the basic difference in the statutory responsibilities conferred on the Corps and the EPA. Pet. App. I11-I13. See pages 2-4, *supra*. Despite petitioner's elaborate plea for review (Pet. 17-28), the court of appeals' ruling presents no question warranting this Court's attention. Contrary to petitioner's suggestion (Pet. 27-28), the court of appeals' decision does not conflict with the Second Circuit's decision in *Bersani* v. *Robichaud*, 850 F.2d 36 (1988), cert. denied, 489 U.S. 1089 (1989). That decision recognized that the EPA could take into account practicable alternatives in exercising its veto authority. See 850 F.2d at 43-46. The decision, however, does not prevent the EPA from vetoing a permit where no practicable alternatives to the project exist.

2. Petitioner's challenge to the court of appeals' determination upholding the EPA's finding of "unacceptable" environmental harm is also without merit. The court of appeals carefully examined the EPA's decision and determined that "[i]ts findings are supported by the administrative record, are not arbitrary and capricious, and for that matter, are supported by substantial evidence." Pet. App. I19. Petitioner suggests that the court of appeals gave insufficient scrutiny to the EPA's analysis. Pet. 27-30. That court, however, properly invoked the Administrative Procedure Act's

"arbitrary and capricious" standard of review, 5 U.S.C. 706(2)(A), and it explicitly conducted its review in accordance with this Court's decision in *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). See Pet. App. I16 n.4. The court explicitly stated that it would, in any event, have reached the same conclusion under the substantial evidence standard of review. *Ibid.* The court of appeals carefully evaluated the environmental consequences that the EPA found "unacceptable," see *id.* at I13-I17, and it concluded that the administrative record supported the EPA's determination, *id.* at I19. The court of appeals' determination, which rests on the court's conscientious application of the statutorily prescribed standard of review to a particular administrative record, presents no question warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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